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CONSUMER PROTECTION AND NEW CONTRACT LAW IN THE EUROPEAN UNION AND IN ITALY

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Abstract: *This paper deals with the recent normative modifications introduced in the European Union by the Directive 2011/83/EU (aimed to realise a full harmonisation of member states' rules in some aspects of consumer and contractual law), and consequently in Italy, through the Legislative Decree No. 21/2014 (which transposed the supranational source). As it is known, the principal legal instruments used in the last years by the EU to protect the weak parties are the 'information duties' and the 'right of withdrawal'. The new rules try to strengthen them, but the implementation of the European Directive in Italy gives rise to many arguable points and perplexities.*

Keywords: *Consumer Protection; New Contract Law; Information Duties; Right of Withdrawal; Codice del Consumo*

INTRODUCTION

To start a discussion on consumer protection and new contract law in the European Union and in Italy (Alpa 2014; Mazzamuto 2012; Musio and Stanzione 2009; Di Porto and Lorenzoni 2012), it could be useful to give an answer to some basic question, like this one: does the juridical inhomogeneity among the member states constitute an obstacle (an 'invisible barrier') to the realization of the European integration project? And, if the answer is yes, in order to solve the problem: is it enough a mild harmonization of the domestic rules (so called 'soft' or 'bottom-up' normative approach) or is it necessary to unify national legislations ('top-down approach')? (Lando 1997, 524ff.; Howells and Schulze 2009). At the moment, the EU seems to prefer the first solution (reached through the legislative instrument of a directive), even if in the last years the European institutions have been choosing the way of the 'maximum harmonization'¹.

The legal basis for the progressive convergence of contractual law is today contained, *inter alia*, in two provisions of the Treaty on the Functioning of the European Union (TFEU): Art. 114² and Art. 169³. In addition, a series of other important European documents contributes to establish the legal framework⁴ (rules contained in the Treaties, or in other fundamental '*para-constitutional*' acts, such as the Charter of the Fundamental Rights of the European Union) (Ferraro 2006, *passim*).⁵

¹ As it is emphasized in the 2nd *considerando* of the Directive 2011/83/EU, "full harmonisation of some key regulatory aspects should considerably increase legal certainty for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union. The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. Those barriers can only be eliminated by establishing uniform rules at Union level. Furthermore consumers should enjoy a high common level of protection across the Union". Tonner – Fangerow (2012), underlined that the "full harmonisation approach has the advantage that the European legislator is able to decide which aspects of a problem should be regulated so that member states are not allowed to deviate from the European rule, but that member states are free to regulate problems which are neglected by the European legislator or which did not appear yet at the time when the relevant European legislation was adopted. It allows fully harmonising European law prevailing to national law and at the same time leaves some space for autonomous national legislation. So it seems to be the adequate interim step on the long way of the European integration process" (p. 78). In the matter, cf. also D'Amico 2012, 611ff.; and Mak 2012, 213ff.

² According to the Art. 114 TFEU, par. 3, "The Commission, in its proposals... concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective".

³ The Art. 169 TFEU, par. 1, establishes that "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests".

⁴ The Treaty of Maastricht (1992), in particular, introduced a new title - currently the XIV of Treaty CE consolidated version - expressly dedicated to the 'protection of consumers' and a new Article, 129 A, in virtue of which the Union attributes specific competences in this matter to adopt measures in accordance with Art. 100 A, and promoted actions of support and integration of the politics developed by the Member States. The Treaty of Amsterdam (1997) reformulated Article 129 A, obligating EU institutions - through a horizontal type clause - to consider the consumers' demands in the definition and the implementation of the other Community policies and activities and to expressly recognize the consumers' right to organize themselves for the safeguard of their own interests (Art. 153,2 Treaty CE).

⁵ The Art. 38 (Consumer Protection) provides that "Union policies shall ensure a high level of consumer protection". It is not clear if it is possible to discuss of 'real' human rights.

The European Community understood that if in the national laws there are too many disparities, then distortions of competition may arise between the sellers and suppliers, namely when they sell and supply in other Member States (Cafaggi and Muir Watt 2007). For this reason, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of European Countries other than his own, it is essential to remove the normative differences which appear excessive⁶.

The European Union tried to achieve this aim through many directives on consumer protection, like the Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees, the Directive 2005/29/EC concerning unfair business-to-consumer commercial practices, the Directive 93/13/EEC on unfair terms in consumer contracts, the directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, the Directive 2008/48/EC on credit agreements for consumers, and more recently the Directive 2011/83/EU on consumer rights (Schulze 2015, 139ff.; Collins 2006, 217). With regard to the situation in Italy, although some authoritative doctrinal voices spoke of a real 'normative desert' a few years ago (Ferrara 1989, 515) recently attention has been focused on the establishment of "the expected consumer bill of rights" (Alpa 2002, 4), namely Law no 281 of 1998, initially, and subsequently the so called '*Codice del consumo*' (cons. c.)⁷.

CONSUMER PROTECTION AND CONTRACT LAW: THE NEED FOR A STRONGER WEAK PARTY DEFENCE IN THE NEW TYPES OF PURCHASES

Alongside the more traditional forms of contracting (in-store), in the recent years the protection of purchasers in case of contracts negotiated away from business premises (or door-to-door)⁸ or at distance⁹ is assuming a growing importance in Europe. In relation to this

⁶ A strong unification of the national laws could, of course, enforce this goal. Nevertheless, as Tonner and Fangerow (2012), remarked, "the full harmonisation principle was subject to heavy criticism by member states and academic writers as well, because it bore the danger of leading to a reduction of the consumer protection standard in those member states with a high standard. The EP welcomed the full harmonisation principle but at the same time argued against any reduction of consumer protection in member states" (p. 69).

⁷ Art. 2 of the *Codice* enacts *expressis verbis* that it is possible "to recognize consumers and users the following fundamental rights: a) safeguard of their health; b) safety and quality of products and services; c) suitable information and fair publicity; d) education for consumption; e) fairness, transparency and equity in contractual relationships concerning goods and services; f) promotion and development of a free, voluntary and democratic association between consumers and users; g) the supply of public services according to quality and efficiency standards".

⁸ According to Art. 1 of Directive 85/577/EEC, contracts negotiated away from business premises are contracts concluded: "during an excursion organized by the trader away from his business premises, or during a visit by a trader (i) to the consumer's home or to that of another consumer; (ii) at the consumer's place of work; where the visit does not take place at the express request of the consumer. 2. This Directive shall also apply to contracts for the supply of goods or services other than those concerning which the consumer requested the visit of the trader, provided that when he requested the visit the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's commercial or professional activities. 3. This Directive shall also apply to contracts in respect of which an offer was made by the consumer under conditions similar to those described in para. 1 or para. 2 although the consumer was not bound by that offer before its acceptance by the trader. 4. This Directive shall also apply to offers made contractually by the consumer under conditions similar to those described in para. 1 or para. 2 where the consumer is bound by his offer".

type of commercial transactions, more incisive instruments of protection have been established: before purchase (pre-contractual obligations to make the consumer more informed about his choice), during the purchase (with regard to the modality of the conclusion of the contract, i.e. the way the consensus with the consumer has been obtained) and after purchase (compliant or other mechanisms of redress such as restitution or substitution of the product)¹⁰. A very central role is anyway accorded to the supplier's pre-contractual obligations and above all to the 'prior information'.¹¹ Information duty increases with distance (because the purchaser is not able actually to see the product or to ascertain the nature of the service provided before concluding the contract) or when the consumer is hit 'cold' (and cannot properly evaluate whether the agreement is convenient or not)¹². The obligations *de quibus* are supported by the right of withdrawal that offers the consumer the opportunity to reconsider a contract within a certain period of time¹³.

Both these instruments were recently modified through the Directive 2011/83/UE of 25 October 2011 (Tonner and Fangerow 2012, 67ff.; Giliker 2015, 5ff.; Argyros 2014, 275ff.), which was transposed in Italy by the Legislative decree No. 21 of 21 February 2014 (Cuffaro 2014, 747; D'Amico 2015; Delogu 2009, 953; Dona 2009, 582; Gambino and Nava 2014; Mazzamuto 2011, 868; Pagliantini 2012, 325 and 2014, 797) ('the last step of a legislative process which has seen, over the years, a substantial strengthening of the consumer protection law and an extension of the Italian Authority's competences'¹⁴).

⁹ In the Art. 1 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts is clarified that 'distance contract' means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded".

¹⁰ Consumers may, above all, act for breach of their rights, with two measures: the restoration of the *status quo ante* (through reimbursement, substitution or cancellation) and the application of additional penalties.

¹¹ See Article 4 and 5 of Directive 97/7/EC.

¹² In the 37th *considerando* of the Directive 2011/83/EU it is clearly underlined that "since in the case of distance sales, the consumer is not able to see the goods before concluding the contract, he should have a right of withdrawal. For the same reason, the consumer should be allowed to test and inspect the goods he has bought to the extent necessary to establish the nature, characteristics and the functioning of the goods. Concerning off-premises contracts, the consumer should have the right of withdrawal because of the potential surprise element and/or psychological pressure. Withdrawal from the contract should terminate the obligation of the contracting parties to perform the contract".

¹³ As it has correctly been evidenced by Rott (2007): "EC Directives that primarily use information obligations, frequently but not necessarily in combination with the right to withdrawal, are the Doorstep Selling Directive 85/577/EEC, the Consumer Credit Directive 87/102/EEC, the Timesharing Directive 94/47/EC and the Distance Selling Directives 97/7/EC and 2002/65/EC. Even the Consumer Sales Directive 1999/44/EC that grants the consumer rights once goods are not in the conformity with the contract, separates the informed average consumer from the uninformed consumer in a certain way. Its Art. 2 (2) lit. d) on the relevance of public statements uses a 'reasonable consumer expectations' test that very much resembles the average consumer test of the law of unfair commercial practices. Obviously, regulation that purely relies on information obligations and the right to withdrawal would leave those consumers alone who are less educated and insensitive to information, and who therefore have no reason to reconsider a contract after a second look at it either" (p. 51).

¹⁴ Argentati (2014) underlines that: "the Decree on one hand introduces novelties in the consumer contracts regulation, mostly regarding distance contracts, stipulated online or by telephone, but also in traditional contracts stipulated inside business premises. On the other hand, the Decree states some important provisions in relation to administrative protection conferring an exclusive competence to the Authority to enforce the new rules and definitively establishing the choice of the unitary principle in administrative consumer protection".

THE ITALIAN *CODICE DEL CONSUMO* AND ITS RECENT MODIFICATION

The first collection of all EU consumer protection legislation has been a consolidated Act: the Legislative Decree No. 206, dated 6 September 2005, which came into force on 23 October 2005 (De Cristofaro 2006, 764ff.). It brings the provisions of 21 legal measures together in a single text, called *Codice del Consumo*, synthesising them into 146 articles (the number of articles has been increased to 170 since 2007 update). The Code is a text mostly compilation (summary), regrouping rules already known in the Italian private law system, but it was often reformed and updated. And, as said, one of the most important innovations was realized through the Legislative Decree No. 21/2014. This normative document separately deals with, along the lines of the Directive: i) "Consumer information for contracts other than distance or off premises contracts" (section I; ii); "Consumer information and right of withdrawal for distance and off-premises contracts" (section II; iii) "Other consumer rights" (section III). The 2014 reform in particular introduced a new regime regarding the right to withdraw (the so-called *ius poenitendi*). Before analyzing the most recent rules in the matter, it is interesting to underline that the recent Law concerns Title III (Contractual Modality) of Part III (Consumer relationship) of the *Codice del Consumo*, totally rewriting Chapter I, not more known as "'Particular modalities of contract conclusion', but 'Consumers rights in contracts'. This name, equal to the title of the Directive, testifies the ambitious objective of the legislator – which it is easy to understand in the Proposal of the Directive 8 October, 2008 (COM(2008)614 def.) – of reconsidering the four fundamental Directives on consumer law" (85/577/CEE, 93/13/CEE, 97/7/CE, 99/44/CE) in order to create a sort of European statute of consumer rights as far as contractual provision is concerned. Nevertheless, the Directive 2011/83/EU and Consumer Law did not pursue this objective, because the rules still regulate contracts away of business premises and distance contracts.

THE AREA OF APPLICATION OF THE NEW FRAMEWORK TO PROTECT CONSUMERS

The Legislative Decree 21/2014 opens with three general provisions, (Artt. 45, 46, 47) to define the subjective and objective area of application of the new regulation (Rumi 2015, 32ff.). Art. 45 contains a rich series of definitions, beginning with the one of 'consumer' and 'professional', which should be interpreted *per relationem*, that is to say, by re-conducting them to Art. 3 definitions of the *Codice del Consumo*. The main characters of the consumer bargaining are so unchanged. Particularly, as far the notion of "consumer" is concerned, the reserve of the real physical person should be kept the same, it is the only one who can make use of (Calvo 2003, 715ff.; Chinè 2006, 434ff.). Italian legislator has indeed renounced to the possibility of "extending the rules of the Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisation, start-ups or small and medium-sized enterprises", in accordance to the content

of the 13rd *considerando* of the Directive 2011/83/EU. With regard to the objective aspect: the area of effectiveness of new rules is defined “positively” by the new Art. 46 and “negatively” by the Art. 47 cons. c.

Article 46 states that Sections from I to IV of Chapter I “The provisions of Subchapters I to IV of this Chapter apply to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.” At first impact, this provision seems to incredibly enlarge the possibilities for the application of the law, included the right to withdraw. If we look through the Decree and the previous Directive carefully, we can admit an expansive capability for the new Art. 46.

The new regulation cannot be extended to ‘every operation of consume’, because it is limited to sell contracts, contracts for the supply of water, gas, electricity, when these products are not sold in a limited amount. It could be also limited to district heating and the ones dealing with a digital content, not on a material support, but on download or streaming. We are not dealing with a new general legislation for business to consumer contracts, as the Chapter I can induce to do. Actually, the expression ‘every contract concluded between a consumer and a trader’ is not neutral indeed, in relation with the modality of conclusion of a contract. It should be contained just to the contracts concluded away from business premises or to the distance ones. In their scope, due to the trans-typical aspect of the regulation, we can include not only sales and services contracts, but also –and that’s the *novum*, the contracts for the supply of water, gas, electricity, district heating, which can’t be restricted to one specific volume or to an undetermined quantity and they cannot be included neither in sale contracts nor in the service ones¹⁵.

The Art. 47 contain a long list of Exceptions¹⁶, and it is very interesting to underline the provision of its par. 2, elaborated to prevent and neutralise every traders’ fraudulent conduct. According to this rule, “the provisions of Sections I to IV of this Chapter shall not apply to off-premises contracts for which the payment to be made by the consumer does not exceed EUR 50. However, the provisions of this Chapter shall apply in the case of several contracts

¹⁵ The peculiarity consists of the fact that all of these contracts, if concluded off-business premises or at distance will receive a really strong or the highest protection, constituted by Sections II, III e IV of Chapter I cons. c. (particularly information requirement, obligation in form and withdrawal of repentance). Contrarily, if they are concluded with aggressive facts, they will receive a lower protection, but totally new, which is constituted by the application of the rules of the information requirements (Section I), and by the provisions included in Sections III (other rights of the consumer) and IV (administrative and jurisdictional protection, Jurisdiction and unsolicited supplies) of Chapter I.

¹⁶ As it is possible to read in the 49th *considerando* of the Directive 2011/83/EU, “certain exceptions from the right of withdrawal should exist, both for distance and off-premises contracts. A right of withdrawal could be inappropriate for example given the nature of particular goods or services. That is the case for example with wine supplied a long time after the conclusion of a contract of a speculative nature where the value is dependent on fluctuations in the market (*vin en primeur*). The right of withdrawal should neither apply to goods made to the consumer’s specifications or which are clearly personalised such as tailor-made curtains, nor to the supply of fuel, for example, which is a good, by nature inseparably mixed with other items after delivery. The granting of a right of withdrawal to the consumer could also be inappropriate in the case of certain services where the conclusion of the contract implies the setting aside of capacity which, if a right of withdrawal were exercised, the trader may find difficult to fill. This would for example be the case where reservations are made at hotels or concerning holiday cottages or cultural or sporting events”.

concluded at the same time by the same parties, if the overall amount of the payment to be made by the consumer, regardless of the amount of the individual contracts, exceeds EUR 50".

THE REMEDIES TO PROTECT THE CONSUMER: INFORMATION REQUIREMENT

An aspect substantially new of the last regulation is represented by the generalization of information duty "technique" (De Cristofaro 2014, 929; Occhiuzzi 2014, 10; Alessi 2013, 315; De Cristofaro 2012, 30ff.), intended as the possibility to extend the information requirement to inform to the contracts, whose obligations were not still be provided and, therefore, regulamentated (we intend here different contracts either from the ones negotiated at distance or out of commercial places and referred to specific commercial juridical provisions). This is confirmed despite the fact that the inner laws of Art. 48 are different from the one belonging to Art. 49 for distant contracts and away from business premises.

There are just two limits of the process of generalisation: a) Contracts which entail daily transactions, immediately executed at the moment of their conclusion; b) Apparent information deducted from the context.

It is worth to emphasize that individual remedies to be applied in case of failure to fulfil the information requirement are not detected, but it must be reminded that it is possible a recourse to the Art. 22 cons. c. as far as unfair commercial practices are in case of: a) belated execution of the information requirement (e.g. just before the conclusion of the contract), without allowing the consumer to produce a valid contractual determination (misleading omission); b) uncomplete, incomprehensible or ambiguous information; c) failure of 'contractualisation' of the pre-trade information and its consequent absence of binding elements.

The Art. 49 cons. c. deals with the information requirement off-business premises and distance contracts. It unifies and enlarges the regulation, endowing more effectiveness. Before the process of reform, the regulation was different whether the contract were to be concluded away from business premises or a distance contract: the art 47 old paper stated that the professional had to communicate to the consumer just the information related to the existence and modalities to exercise *jus poenitendi*, whilst, secondly, previous Art. 52 cons. c. requires a communication of further data from the professional to the consumer.

THE FORM OF INFORMATION

The provisions on the information requirement risks to remain without effects, due to the absence of new provisions according to the Artt. 50 and 51, which introduce specific "requirements" in terms of form of information (Pagliantini 2015 in G. D'Amico (eds.), 167ff.).

The Art. 50 cons. c., defined “Formal requirements for the contracts negotiated away from business premises” does not introduce the written form as a structural element of these contracts; it quite remarks the exigency of having a ‘binding form’ of the information to be available anytime to the consumer. It could be a paper, but also another durable tool. In both cases, the consumer could be protected as it will be facilitated by the possibility of having information on a stable support; furthermore the stable support will be binding for the professional in the contents mentioned or promised before the conclusion of the contract. Information shall be legible (graphically e typographically), simple and comprehensible (in terms of its content). Professional is required to deliver to the consumer ‘a copy of the signed contract or confirmed’, also here ‘on paper or, with the consumer’s agreement, on other forms of stable tool’. The document fulfils to a double function: a) it promotes a further thought of the consumer, with regard to the content of contractually made commitment and to the opportunity of getting rid of it, through *jus poenitendi*; b) it enables the consumer to verify eventual differences between preliminary received information and information included in the contract, with the possibility of pretending that the professional be pledged to the conditions proper of pre-contractual disclosure. The new form of regulation not only unifies the juridical treatment but also it enriches the content. In fact, whether the contracts we are discussing about, concern the provision of inner market services and e-commerce, the amount of information is supplemented by the provisions, contained in legislative decrees 59/2010 and 70/2003, considering further integrations, according to legal provisions of Art. 6 § 8, dire. 2011/83/EU.

Moreover, so as the information be effective, the Italian legislator, by virtue of the possibility pursuant to Art. 6, § 7, so as to make information more effective has provided that the consumer shall receive all the amount of information in Italian; contrarily, the professional would be charged of demonstrating the respect of information requirements.

The Art. 51 cons. c., paragraph 2 and 6, states form requirements not only with regard to information, but also the contract, particularly, the phone and the telematic ones. Whilst the distance contract shall be concluded with electronic means, the consumer shall place his order online. This order constitutes the obligation of paying, just by a click, and it shall mention “order with obligation to pay”; indeed, this last sentence will make the consumer conscious of the importance of the act of purchasing. This formal process protects the consumer, avoiding that the provision intended as free of charge, hidden e.g. a subscription contract for consideration, and immunises the act of the professional, who has acted according to a standard of diligence.

THE SECOND REMEDY TO PROTECT THE CONSUMER: THE RIGHT OF WITHDRAWAL

The institute of withdrawal is, without any doubt, the one most modified by the new regulation (Rumi 2015, 183ff.; S. Pagliantini 2015, 275ff.; Pilia2008; Barca 2011; Benedetti 2011, 964; Farneti 2014, 963; Ferrari 2010, 7ff.; Grandi 2013, 69). The right in question has been defined as an “instrument of reaction for consent captation techniques, which are incredibly fast and elusive or, at least, able to reduce the capability of the weak contractor to value calmly the offer he need to face with” (Benedetti 2011, 964).

About the area of operability of the remedy, it can be immediately made a point on the Art. 46 that, at least at first impact, seems to legitimate the application of all the regulation introduced by the novelty to ‘every contract concluded between a professional and a consumer’. According to the heading of Section II and the formulation of 1st art 52 cons. c. that, excluded the hypothesis ex art 59, recognizes to the consumer a period of 15 days to withdraw from the contract, a right of rethink seems to emerge, coherently with its inspirational ratio: it has a reason of being just in the presence of sale negotiated through these modalities. With regard to the strategic role assigned to the withdrawal by the European legislation, it is possible to underline that the alignment of the juridical treatment of the right of withdrawal has revised its main function.

From a classical mean of protection, it became a remedy in order to guarantee the certainty of Law in the EU. It is, therefore, suitable today to contrast the legislative fragmentation between the Member States and appropriate to offer a clear and defined regulatory prospect (Yilma 2013, 212ff.).

Here the ‘double soul’ of *jus poenitendi*, characterized for some aspects by the *favour consumatoris* (thanks to the Art. 54 cons. c. the statement of withdrawal from the form *ad validitatem* unburdened; see also Art. 52, 2^o par, n. 2, cons. c., which admits a partial withdrawal in case of juridical values made of ‘several lots’ or ‘multiple pieces’) and, for other aspects, by the *favour mercatorum* (the Art. 59 cons. c, includes a series of Exclusions, as the right to rethink, linked by the scope of promote enterprises).

The new regulation of the repentance could be mostly appreciated, considering the unification and the extension of the deadline to withdraw (Art. 52, cons. c.), the consequences of an eventual breach of the obligation to inform (Art. 53, cons. c.), the effects of the withdraw in relation to the duties of the parties (Art. 57 cons. c.) and the sort of fringe contracts (Art. 58 cons. c) (Guzzardi 2012, 228ff.).

As regards the procedure in exercising this right, the written form is no longer required, rather, the consumer must inform the trader presenting any type of unequivocal statement or by using a harmonized withdrawal form (included in attachment I, part B). And as it has been argued “this measure aims to simplify the procedure, especially in order to reduce costs for the trader in cross-border sales (Argentati 2014, 168).

OTHER CONSUMER RIGHTS

The new regulation enriches the series of the weak party's protection instruments, adding new profiles under the heading "Other consumer rights" (Pagliantini 2015 in G. D'Amico (eds.), 264ff.). It deals with heterogeneous dispositions having different applications¹⁷. The Articles 61 and 63 cons. c., indeed, by dint of being related to the delivery and the passing of risk, apply just in sale contracts. Article 62 (Fees for the use of means of payment), 64 (Telephone communication) e 65 (Additional Payments), apply both in sale and service, the supply of water, oil, electricity, telewarming and digital contents.

CONCLUSION

The new regulation has certainly renewed the asset of the *Codice del Consumo*, focusing on its central part on Consumer Relations. Despite its title (Consumer Rights in Contracts) and the scope to reach a global harmonisation, the new asset looks deficient and deliberately ambiguous (De Cristofaro 2014, 217ff.).


The relevant part on the information requirements (Art. 48 and 49), on additional payments without the expressed consumer consensus (Art. 65) are bound to be implemented. In addition, a possible solution to fill the gaps could be realised by reconducing the professional behaviour in the misleading omissions *ex art* 22 cons. c.

Quite ambiguous is the provision of the Art. 51, § 2, cons. c, which introduces new formal requirements for distance contracts by placing the order online, since gives to the interpreter the commitment to translate the neutral non-binding nature of the contract.

Not so clear is the Art. 51 § 6, in fact it is difficult to imagine a contract that can be concluded on a paper, but also because it could generate a process of signature exchange. The phone contract can easily become amorphous, not more formal. Even *jus poenitendi*, real pillar of the consumer protection, leaves a bit of perplexity, as it could be activated with perfected contracts and simple contractual proposals.

However, the most arguable provision is the Art. 67 cons. c., which is a closure rule and admits the competition of several rules, from the European Union, that concedes rights to consumers. The result is the presence of doubts if the competing rules are not compatible among them. According to the doctrine, this eventuality is not covered by the extension of the Art. 67 (D'Amico 2015, 29 ss.). The article in question could just find effectiveness when the rights of Chapter I include rights without a civil penalty.

¹⁷ Argentati (2014) speaks of "three distinct practices (...) that are, on one hand, inspired by the discipline of unfair business practices, and on the other hand, introduce two significant prohibitions from a private law perspective. In the first scenario, we must underline the prohibition for the trader to impose additional fees on the consumer compared to how much the traders themselves pay by using certain means of payment (...) The regulation, in substance, imposes a clear opt-in for the consumer and seems to prohibit opt-out mechanisms frequently used by operators in the sale of goods or ancillary services; it is up to the consumer to expressly refuse the service which is otherwise inferred as requested or accepted (e.g. pre-ticked boxes)" (p. 169).

In this case, it is possible to apply the remedies provided by the European legislator in favour of the consumer; thus, the weak party can cumulate all of these remedies with the protection provided by other rules of European legislation. 

REFERENCES

1. Alessi R. (2013), *Gli obblighi di informazione tra regole di protezione del consumatore e diritto contrattuale europeo uniforme e opzionale*, Europa e diritto privato.
2. Alpa G. (2002), *Il diritto dei consumatori*, Laterza, Bari-Roma.
3. Alpa G. (eds.) (2014), *I contratti del consumatore*, Giuffrè, Milano.
4. Argentati A. (2014), *The main innovations of the Italian Legislative Decree no. 21/2014 transposing the Directive 2011/83/EU on Consumer Rights*, *Rivistaitaliana di Antitrust*.
5. Argyros G. (2014), *Implementation of the Consumer Rights Directive: Greece*, *Journal of European Consumer and Market Law*, Issue 4.
6. Barca (2011), *Il diritto di recesso nei contratti del consumatore*, Milano.
7. Benedetti A. M. (2011), *Recesso del consumatore*, *Enciclopedia del diritto*, Annali IV, Giuffrè, Milano.
8. Cafaggi F. – Muir Watt H., (2007), *The making of European Private Law: Regulation and Governance design*, 5, available at: <http://www.ihs.ac.at/publications/lib/ep13.pdf>.
9. Chinè G. (2006), *Uso e abuso della nozione di consumatore nel codice del consumo*, *Corriere di merito*, n. 4/2006.
10. Calvo R. (2003), *Il concetto di consumatore, l'argomento naturalistico ed il sonno della ragione*, *Contratto e Impresa/Europa*.
11. Collins H. (2006), *The Alchemy of Deriving General Principles of Contract Law from European Legislation: In search of the Philosopher's Stone*, *European Review of Contract Law*.
12. D'Amico G. (2012), *Direttiva sui diritti dei consumatori e Regolamento sul diritto comune europeo della vendita: quale strategia dell'Unione europea in materia di armonizzazione?*, *Contratti*.
13. D'Amico G. (2015), *Introduzione*, in G. D'AMICO (eds.), *La riforma del codice del consumo. Commentario al D. Lgs. n. 21/2014*, Milano, 2015.
14. De Cristofaro G. (2006), *Il "Codice del consumo"*, *Nuove leggi civili commentate*, n. 5/2006.
15. De Cristofaro G. (2011), *La direttiva 2011/83/UE sui "diritti dei consumatori": ambito di applicazione e disciplina degli obblighi informativi precontrattuali*, in A. D'Angelo – V. Roppo (eds.), *Annuario del contratto*, Torino.
16. De Cristofaro G. (2014), *After Implementing Directive 2011/83/EU in the Member States: Are the National Provisions on Consumer Contracts Really Harmonised? Some Critical Remarks*, *Journal of European Consumer and Market Law*, Issue 4.
17. De Cristofaro G. (2014), *La disciplina degli obblighi informativi precontrattuali nel codice del consumo riformato*, *Nuove leggi civili commentate*.
18. Di Porto F. – Lorenzoni L. (2012), *Consumer protection in Europe*, 5-6, available at www.iern.net.
19. Farneti M. (2014), *Il nuovo recesso del consumatore dai contratti negoziati fuori dai locali commerciali e a distanza*, *Nuove leggi civili commentate*.
20. Ferrara R. (1989), *Consumatore (Protezione del) nel Diritto Amministrativo*, *Digesto delle discipline pubblicistiche*, Utet, Torino, vol III.
21. Ferrari C. (2013), *Ipotesi di qualificazione per il <<recesso>> del consumatore*, *Rivista di diritto civile*.

22. Ferraro A. (2006), *Competition Law and Consumer Protection in Italy, the EU and the UK*, *Rivista italiana di diritto pubblico comunitario*.
23. Giliker P. (2015), *The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive*, *European Review of Private Law*, Issue 1.
24. Grandi M. (2013), *Lojuspoenitendinella Direttiva 2011/83/UE sui diritti dei consumatori*, in *Contratto e Impresa/Europa*.
25. Guzzardi G. (2015), *Sub artt. 56, 57 e 58*, in G. D'AMICO (eds.), *La riforma del codice del consumo. Commentario al D. Lgs. n. 21/2014*, Milano, 2015.
26. Howells G. G., Schulze R. (eds.) (2009), *Modernising and Harmonising Consumer Contract Law*, Sellier, Munich.
27. Lando O. (1997), *Why Codify the European Law of Contract*, in *European Review of Private Law*, vol. 5.
28. Mak V. (2012), *Full Harmonization in European Private Law: A Two-Track Concept*, *European Review of Private Law*, Issue 1.
29. Mazzamuto S. (2012), *Il contratto di diritto europeo*, Giappichelli, Torino.
30. Musio A. – Stanzione P. (eds.) (2009), *La tutela del consumatore*, *Tratt. Bessone*, vol. XXX, Giappichelli, Torino.
31. Occhiuzzi P. (2014), *Gli obblighi informativi*, *Corriere giuridico*.
32. Pagliantini S. (2015), *L'ibridazione del nuovo recesso di pentimento*, in *Rivista di diritto civile*, n. 2/2015.
33. Pagliantini S. (2015), *Sub artt. 51*, in G. D'AMICO (eds.), *La riforma del codice del consumo. Commentario al D. Lgs. n. 21/2014*, Milano, 2015.
34. Pilia C. (2008), *Accordo debole e recesso*, Giuffrè, Milano.
35. Rumi T. (2015), *Sub artt. 45, 46, 47*, in G. D'AMICO (eds.), *La riforma del codice del consumo. Commentario al D. Lgs. n. 21/2014*, Milano, 2015.
36. Rott P. (2015), *Consumers and Services of General Interest: Is EC consumer law the future?*, *Journal of Consumer Policy*.
37. Schulze R. (2015), *The New Shape of European Contract Law*, *Journal of European Consumer and Market Law*, Issue 4.
38. Tonner K. – Fangerow K. (2012), *Directive 2011/83/EU on consumer rights: a new approach to European consumer law?*, in *Journal of European Consumer and Market Law*.
39. Yilmak M. (2013), *Scope of Rights of Withdrawal vis-à-vis Auctions under the Consumer Rights Directive*, *Journal of European Consumer and Market Law*, Issue 4.